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No. 93-714

In the Supreme Court of the United States

OCTOBER TERM, 1993

U.S. BANCORP MORTGAGE COMPANY, PETITIONER

v.

BONNER MALL PARTNERSHIP

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Bankruptcy Code authorizes a judge to confirm a plan of reorganization that grants the equity owners of a failed debtor an exclusive opportunity to purchase an ownership interest in the reorganized business, but does not provide for full payment of objecting classes of unsecured claims.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Bankruptcy Code authorizes a judge to confirm a plan of reorganization that grants the equity owners of a failed debtor an exclusive opportunity to purchase an ownership interest in the reorganized business, but does not provide for full payment of objecting classes of unsecured claims. That question is of great interest to the United States because various agencies of the federal government—including the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Small Business Administration, the Farmers Home Administration, and the Rural Electrification Administration—frequently participate as creditors in bankruptcy reorganization proceedings,

and because the Court's resolution of that question significantly will affect the ability of creditors to gain control of businesses that seek to reorganize under the Bankruptcy Code without repaying their creditors.

STATUTORY PROVISION INVOLVED

Section 1129 of the Bankruptcy Code, 11 U.S.C. 1129, is set forth in an appendix, *infra*, 1a-6a.

STATEMENT

1. In 1984 and 1985, an entity named Northtown Investments built the Bonner Mall in Bonner County, Idaho. Northtown financed construction of the mall with a \$6.3 million loan from First National Bank of North Idaho; petitioner now holds that loan. In October of 1986, Northtown sold the mall to respondent, subject to the mortgage that secures repayment of petitioner's loan. Respondent is an investment vehicle formed for the purpose of buying the mall; it is composed of five trusts and an individual investor. When income from the mall declined, respondent defaulted in the payment of real property taxes owed to Bonner County, Idaho. Petitioner then exercised its right under the loan documents to schedule the property for a foreclosure sale to be held on March 14, 1991. See Pet. App. A4-A5, A91-A92.

2. On the day before the sale, respondent filed a petition in the United States Bankruptcy Court for the District of Idaho, seeking relief under Chapter 11 of the Bankruptcy Code.[1] Under Section 362(a) of the

[1] Chapter 11 generally provides for the reorganization of business enterprises. See *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2199-2202 (1991) (discussing the scope of Chapter 11).

Code, 11 U.S.C. 362(a),[2] the filing of the bankruptcy petition automatically stayed petitioner's foreclosure sale. Petitioner accordingly sought relief from the stay. Because the amount due to petitioner (about \$6.6 million) exceeded the value of the mall, petitioner was entitled under the Code to proceed to foreclosure unless respondent could establish that retention of the mall was necessary to an effective reorganization and that there was a reasonable possibility of a successful reorganization within a reasonable time. Section 362(d)(2); see *United Savings Association* v. *Timbers of Inwood Forest Associates*, 484 U.S. 365, 374-376 (1988); Pet. App. A5-A7, A19, A92-A93.

a. On August 23, 1991, the bankruptcy court issued an opinion denying petitioner's motion for relief from the stay. Pet. App. A118-A129. The court accepted respondent's argument that there was a realistic prospect for reorganization, based on respondent's intention to contribute additional capital, in return for which it was contemplated that respondent would retain an ownership interest in the reorganized enterprise. *Id.* at A124-A125. Because the court concluded that it could not rule out the possibility of an effective reorganization, the court denied the motion for relief from the stay. *Id.* at A127.

b. Respondent filed its First Amended Plan of Reorganization on October 31, 1991. See Pet. App. A93. That plan provides for transfer of respondent's assets to a new entity, Bonner Mall Properties, Inc. (BMP). J.A. 6. Three aspects of the plan are important for this case. First, BMP would pay petitioner's

[2] For convenience, we cite the provisions of Title 11 by Section number only; similarly, we refer to the entire Title as the Code.

secured claim ($3.2 million)[3] in a single balloon payment 32 months after confirmation, with monthly interest payments to be made during the interim.[4] J.A. 11.[5] Second, the general unsecured claims (petitioner's deficiency of about $3.4 million,[6] as well as the claims of other miscellaneous creditors) would be discharged in exchange for shares of stock in BMP at a rate of under ten cents on the dollar; all of those claims would be satisfied by the issuance of 300,000 shares of preferred stock with a par value of $1 each. Those preferred shares could be redeemed at any time by BMP for their par value, but could be converted by petitioner, if respondent succeeded in repaying petitioner's secured claim, to 15% of the then outstanding common stock of BMP. J.A. 19-20. In return for a contribution of $200,000, and an obligation to fund any shortfall in working capital until the

[3] In its August 1991 opinion, the court concluded that the mall was worth only $3.2 million, relying on local tax assessment figures. Pet. App. A125-A126.

[4] Alternatively, if petitioner elected that its entire claim be treated as secured under Section 1111(b), petitioner would be repaid in equal monthly installments over 30 years in an amount that would have a discounted present value equal to petitioner's secured claim. J.A. 14. For a general discussion of the reasons a creditor would make a Section 1111(b) election, see Lynn M. LoPucki, *Strategies for Creditors in Bankruptcy Proceedings* § 12.9.4 (2d ed. 1991) [hereinafter LoPucki, *Strategies*].

[5] The holders of the other secured claims also were to be repaid by various schedules of monthly or annual payments specified in the plan. J.A. 13-17.

[6] Under Section 506(a), the portion of petitioner's claim that exceeds the value of the collateral is treated as an unsecured claim. See generally *Dewsnup* v. *Timm*, 112 S. Ct. 773 (1992) (discussing the effect of Section 506 on undersecured creditors).

maturity date of petitioner's claim, respondent's owners would receive 2 million shares of common stock. J.A. 19. See generally Pet. App. A19-A22, A93-A95 (summarizing terms of the plan).

To put the matter in practical terms, if BMP did not succeed in paying off petitioner's secured claim, petitioner would be able to take control of the mall at the end of the 32 months,[7] in which event the ownership interests (including the preferred stock representing petitioner's unsecured claim) would have negligible value. If BMP did succeed, petitioner's secured claim would be repaid, and the preferred stock representing petitioner's $3.4 million unsecured claim could either (a) be redeemed for $300,000 (if BMP desired to do so) or (b) be exchanged for 15% of the ownership in BMP (if BMP did not redeem the stock before petitioner decided to exchange it for common stock).[8] If petitioner's preferred stock were converted to common stock, respondent's owners would hold about 85% of the ownership as compensation for their contribution of $200,000; if petitioner's preferred stock were redeemed, the contribution of respondent's owners would bring 100% of the ownership interests.

[7] See J.A. 11-12 (discussing petitioner's remedies if respondent fails to comply with the plan).

[8] The actual amounts would be about 93% of the $300,000 and 15% figures stated in the plan, because those entitlements were to be shared pro rata among all of the general unsecured claimants (classified under the plan as Class 3a unsecured claims). J.A. 19-20. Petitioner's $3.4 million claim constitutes about 93% of the $3.644 million in Class 3a unsecured claims. See First Amended Disclosure Statement (Oct. 31, 1991), Record on Appeal item 15, at 18 & n.4 (included in the excerpts of record filed by petitioner in the court of appeals).

c. After consideration of the proposed plan, the bankruptcy judge issued an opinion on December 6, 1991, granting petitioner's motion for relief from the stay, based on the court's conclusion that the Bankruptcy Code does not permit the owners of a failed enterprise to retain an ownership share in the reorganized business over the objection of unpaid creditors, even if the ownership share rests on "new value" contributed by the owners. J.A. 29-33. The court relied on the opinion issued by a panel of the Fifth Circuit in *Phoenix Mutual Life Insurance Co.* v. *Greystone III Joint Venture* (*In re Greystone III Joint Venture*), 995 F.2d 1274 (1991), which set forth a similar interpretation of the Code.[9] J.A. 31-32.

3. The district court reversed. Pet. App. A90-A117.[10] The court concluded "that the new value exception to the absolute priority [rule] did survive the enactment of the 1978 Bankruptcy Code." *Id.* at A116.

4. The court of appeals affirmed. Pet. App. A1-A84. The court first concluded (*id.* at A33-A51) that the precise terms of the Code did not eliminate the rule, developed in cases under the old Bankruptcy Act, that permitted owners to participate in reorganizations if they contributed new value to the reorganized entity (a rule generally referred to as the "new value exception"). The court acknowledged that the Code bars owners from receiving an interest under a plan of reorganization "on account of" their prior interest

[9] The *Greystone* panel's opinion subsequently was withdrawn on rehearing. 995 F.2d 1284 (per curiam), cert. denied, 113 S. Ct. 72 (1992).

[10] A slight correction was made by an opinion reprinted at Pet. App. A88-A89.

in the failed business. The court reasoned, however, that a plan giving the prior owners an interest is permissible—even if they have an exclusive right to acquire that ownership interest—because their participation is permitted not "on account of" their prior interest in the debtor but "because such participation is necessary for a successful reorganization and in the best interests of all concerned." *Id.* at A50.

The court also rejected (Pet. App. A61-A71) petitioner's argument that the dramatic changes in reorganization practice introduced by the Code had abolished the new value exception. The court concluded that "the structural changes to the reorganization process made by the Code are in harmony with the pro-confirmation principle underlying the new value exception." *Id.* at A64.

Finally, the court stated (Pet. App. A71-A79) that the new value exception is consistent with the underlying policies of Chapter 11 because it encourages "successful rehabilitation of debtors," and "maximize[s] the value of the estate." *Id.* at A71-A72. The court rejected petitioner's argument that the new value exception conflicts with the Chapter 11 policy of protecting creditor interests because "successful debtor reorganization and maximization of the value of the estate are the primary purposes [of Chapter 11]." *Id.* at A74-A75.

SUMMARY OF ARGUMENT

Section 1129 of the Code bars confirmation of a plan of reorganization in a Chapter 11 proceeding over the objection of a class of unpaid unsecured claims if the plan grants the owners of the failed business "any property" "on account of" their ownership of the failed business, Section 1129(b)(2)(B)(ii), and permits

confirmation only if the plan is otherwise "fair and equitable," Section 1129(b)(1). The plan proposed in this case fails both of those standards.

1. The statutes that preceded the Code permitted confirmation of a plan only if it was both fair and equitable and also approved by the creditors. In cases interpreting those statutes, this Court suggested that a plan could be fair and equitable even if the owners retained an interest in the reorganized business without repaying all of the creditors, but only if that interest were given in return for a contribution of new value by the owners. Because those statutes did not permit confirmation of any plan without creditor consent, the new value rule recognized by the Court did not permit the owners of the failed business to retain an interest without consent of the creditors as a group.

The Code adopts a different framework for approving reorganizations, under which a plan can be confirmed if it is either fair and equitable or approved by the creditors. In our view, that framework is designed to allow creditors to determine when continuing participation in ownership by the owners of the failed business would aid the success of the reorganized enterprise. Because the creditors are the parties with money at stake, the Court should be reluctant to read the Code to permit judges to second-guess the creditors' judgment regarding how best to reorganize the business. Furthermore, offering the owners an opportunity to insist on a share of the reorganized business without repaying their creditors would tend to exacerbate the problems that have made Chapter 11 proceedings both expensive and protracted. These considerations indicate that a plan allowing owners to retain an interest over the

objection of a class of unpaid unsecured claims is not "fair and equitable" within the meaning of the Code and thus cannot be confirmed under Section 1129(b).

2. The Court can decide this case without reaching the broad question whether the Code permits any plan providing for continued participation without repaying objecting creditors, because the plan proposed in this case is objectionable on a narrower ground as well. The plan would grant respondent's owners the exclusive right to purchase a controlling interest in the reorganized business; that exclusive right constitutes "property" that would be conferred by the plan. Because the only plausible basis for granting that right would be the status of its recipients as former owners of the business, the grant would be one made "on account of" the interest those individuals held in the failed business. Accordingly, it is barred by the language of Section 1129(b)(2)(B)(ii).

ARGUMENT

THE PLAN PROPOSED BY RESPONDENT DOES NOT SATISFY THE REQUIREMENTS OF THE BANKRUPTCY CODE

I. Sections 362 And 1129 Of The Bankruptcy Code Provide A Comprehensive Framework For Determining Whether A Proposed Plan Of Reorganization Is Sufficient To Justify Continuation Of An Automatic Stay Preventing A Creditor From Taking Control Of Its Collateral Upon Default By A Bankrupt Debtor

This case comes to the Court on appeal from petitioner's motion for relief from the automatic stay imposed by Section 362(a) of the Code. Petitioner seeks relief from the stay so that it can foreclose the mortgage it holds on the mall respondent owns.

Under Section 362(d), petitioner is entitled to relief from the stay if respondent "does not have an equity in [the] property" and if the "property is not necessary to an effective reorganization." Because it is clear that respondent does not have an equity in the property—petitioner's claim of about $6.6 million far exceeds the value of $3.2 million determined by the bankruptcy court—the remaining question is whether the property is necessary to an effective reorganization. See generally *United Savings Association* v. *Timbers of Inwood Forest Associates*, 484 U.S. 365, 374-376 (1988) (discussing Section 362(d)). As the case now stands, the only possible basis for an effective reorganization is the plan considered by the court of appeals. Hence, petitioner is entitled to relief from the stay if the Code prohibits confirmation of that plan.

Section 1129 of the Code sets forth the exclusive circumstances under which a judge can confirm a plan of reorganization in a Chapter 11 proceeding.[11] The thirteen paragraphs of Section 1129(a) impose specific requirements for confirmation, including, of particular relevance here, the requirement in paragraph (8) that each impaired class of claims must accept the plan.[12] Section 1129(b), however, allows a judge in

[11] The first clause of Section 1129(a) states that "[t]he court shall confirm a plan only if all of the following requirements are met" (emphasis added).

[12] Section 1124 of the Code defines impairment. It is undisputed that the proposed plan would impair the classes of claims that include petitioner's secured and unsecured claims. See J.A. 11, 17. It also is undisputed that petitioner would oppose the plan. See Pet. App. A23 ("It is a foregone conclusion that * * * the unsecured class of which [petitioner] is the principal member will vote not to confirm the plan."). Because

certain circumstances to confirm a plan even if an impaired class of claims does not consent, but only if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan," Section 1129(b)(1). The common references to "cramdowns" in reorganization proceedings refer to a judge's approval of a plan under Section 1129(b) without the consent of all of the impaired classes of claims.[13]

Paragraph (2) of 1129(b) sets forth the minimum content for the meaning of the "fair and equitable" requirement, by stating that "the condition that a plan be fair and equitable with respect to a class includes the following requirements."[14] Those requirements are grouped into three subparagraphs:, subparagraph (A) dealing with secured claims, subparagraph (B) dealing with unsecured claims, and subparagraph (C) dealing with interests. Subparagraph (B) is the provision relevant to this case, which involves the fairness of the plan's treatment of

petitioner holds about 93% of the claims in that class, see note 8, *supra*, its vote would be sufficient to prevent acceptance of the plan by that class under Section 1126(c); that Section requires an affirmative vote of "at least two-thirds in amount and more than one-half in number of the allowed claims of [the] class."

[13] See, *e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess. 413 (1977) [hereinafter House Report] (noting that Section 1129(b) "contains the so-called cramdown").

[14] The provisions of the Code establishing rules of construction make it clear that the specific references in Section 1129(b)(2) to what the "fair and equitable" standard "includes" are not exclusive. See Section 102(3) ("'[I]ncludes' and 'including' are not limiting.").

petitioner's unsecured claim.[15] Subparagraph (B) requires a plan, at a minimum, to meet one of two options in order to satisfy the "fair and equitable" standard of Section 1129(b)(1). First, the plan can pay the claim in full as of the date of the plan. Section 1129(b)(2)(B)(i). If the plan does not pay the claim in full, however, it must comply with the so-called "absolute priority" rule,[16] which states: "[T]he holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property."[17] Section 1129(b)(2)(B)(ii). In addition, as

[15] The proposed plan would satisfy the requirements of Section 1129(b)(2)(A) with respect to petitioner's secured claim by providing for payments with a present value as of the date of the plan equal to the entire value of petitioner's secured claim. See J.A. 11-12.

[16] The term "absolute priority" apparently was adopted to distinguish the rule from a system of "relative priority," which would allow interests with claims of lower priority to share in the estate, provided they received less than claims of higher priority. See *Collier on Bankruptcy* ¶ 11.06, at 221 (James Wm. Moore 14th ed. 1940, Lawrence P. King rev. 1977) [hereinafter *Collier's 14th ed.*]; see also *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 119 (1939) (holding that a plan violated the absolute priority rule of Section 77B of the Bankruptcy Act even though "the relative priorities of the bondholders and the old * * * stockholders are maintained").

[17] The House Report explained the purpose of the provision as follows:

> It requires simply that the plan meet certain standards of fairness to dissenting creditors or equity security holders. The general principle of the subsection permits confirmation notwithstanding nonacceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule. The dissenting class must be

noted above, even if a plan meets one of subparagraph (B)'s two options, it also must satisfy the general "fair and equitable" standard of Section 1129(b)(1).

Respondent's plan proposes that its owners, whose interests are junior to petitioner's, receive an ownership interest in the reorganized debtor in return for a capital contribution of $200,000 and an obligation to fund working capital shortfalls during the first 32 months of the plan. J.A. 19. That plan violates Section 1129(b) if it fails the general "fair and equitable" standard established by Section 1129(b)(1), or if it gives those junior claimants any "property" "on account of" their prior ownership interest, Section 1129(b)(2)(B)(ii). For the reasons set forth below, we submit that the proposal does not comport with either of those standards.

II. The Bankruptcy Code Does Not Authorize A Judge To Confirm A Plan Of Reorganization That Grants The Equity Owners Of A Failed Debtor An Exclusive Opportunity To Purchase Ownership Interests In The Reorganized Business If The Plan Does Not Provide For Full Payment Of Objecting Classes Of Unsecured Claims

This is not the first time that the Court has considered the permissibility under the Code of a plan of reorganization that would force creditors to accept a plan under which the equity owners of a failed

> paid in full before any junior class may share under the plan. If it is paid in full, then junior classes may share.

House Report, *supra* note 13, at 413; see *ibid.* ("[I]f the class is impaired, then they must be paid in full or, if paid less than in full, then no class junior may receive anything under the plan.").

debtor would retain an ownership interest in a reorganized debtor. The Court previously considered that question in *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988), where the Court determined that the plan proposed in that case violated the Code because the consideration offered by the owners for the interest in the reorganized debtor was not sufficiently concrete. *Id.* at 202-209. We argued in that case that the language and structure of the Code prohibit in all circumstances confirmation of a plan that grants the prior owners an equity interest in the reorganized debtor over the objection of a class of unpaid unsecured claims.[18] See Brief for the United States as Amicus Curiae at 11-23, *Ahlers* (No. 86-958, O.T. 1987) [*Ahlers* Brief][19]; *Ahlers*, 485 U.S. at 203-204 n.4 (noting the government's argument). As explained below, we continue to hold the views we expressed in *Ahlers*. See Point II.A, *infra*. But even if there are some circumstances in which the Code would permit confirmation of such a plan, this case does not present them, because the plan proposed in this case would grant the prior owners an exclusive opportunity to acquire an ownership interest in the reorganized debtor. See Point II.B, *infra*.

[18] We refer to a class of unpaid unsecured claims as a convenient term to describe a class of claims that is both impaired (under Section 1124), and not paid in full (under Section 1129(b)(2)(B)(i)).

[19] We have provided copies of the *Ahlers* Brief to all counsel who participated in this case at the petition stage.

A. *The fair and equitable standard does not permit confirmation of a plan granting equity owners an ownership interest in the reorganized enterprise over the objection of a class of unpaid unsecured claims*

1. The Congress that enacted the Code in 1978 did not write on a clean slate in drafting the framework for approving plans of reorganization that appears in Section 1129. Both the Chandler Act of 1938 (codified as Chapter X of the old Bankruptcy Act of 1898)[20] and Section 77B (its 1934 precursor)[21] included procedures for adopting plans for the reorganization of failing businesses. Three features of those predecessor statutes are important for understanding the legal landscape that confronted the drafters of the Code. First, the prior statutes authorized a court to approve a plan only if it was "fair and equitable"; thus, those statutes did not permit adoption of a plan that did not meet the "fair and equitable" standard, even if the creditors voted to approve the plan.[22] Second,

[20] The Chandler Act of 1938, ch. 575, 52 Stat. 883, added a new Chapter X to the Bankruptcy Act. Under Section 221 of that Chapter, a court could confirm a plan only if it found, among other things, that "the plan is fair and equitable." 11 U.S.C. 621(2) (1976). See generally *Collier's 14th ed., supra* note 16, ¶ 11.06 (discussing "fair and equitable" requirement of Chapter X of the Bankruptcy Act).

[21] Section 77B was added to the 1898 Act by the Act of June 7, 1934, ch. 424, 48 Stat. 911. Under Section 77B(f)(1), a judge could confirm a plan only if it found that the plan was "fair and equitable and d[id] not discriminate unfairly in favor of any class of creditors or stockholders." 48 Stat. 919.

[22] See Peter F. Coogan, *Confirmation of a Plan Under the Bankruptcy Code*, 32 Case W. Res. L. Rev. 301, 325-326 (1982) (discussing pre-Code law requiring both approval by creditors and a finding that plan was fair and equitable); see also *Case* v.

neither of those statutes offered any definition of the "fair and equitable" standard.[23] Third, each of those statutes required creditor consent for adoption of a plan in all cases.[24]

In the absence of a statutory definition, this Court concluded that "[t]he words 'fair and equitable' as used in § 77B(f) are words of art which prior to the advent of § 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations." *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939). In Justice Douglas's words, that phrase was intended to codify "the 'familiar rule' * * * that 'any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of

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Los Angeles Lumber Products Co., 308 U.S. 106, 115 (1939) (denying confirmation of a Section 77B plan as not fair and equitable even though creditors had approved the plan; explaining that "the fact that [an overwhelming majority of the creditors] have approved the plan is * * * immaterial on the basic issue of its fairness").

[23] 11 U.S.C. 621(2) (1976); 48 Stat. 919 (Bankruptcy Act § 77B(f)(1)). See generally *Collier's 14th ed., supra* note 16, ¶11.06 (discussing "fair and equitable" requirement of Chapter X of the Bankruptcy Act); *id.* ¶ 11.04, at 181 & n.1 (noting that the relevant provision of Chapter X was "derived from former §77B(f)(1)" and that "[t]here has been no change in substance").

[24] Section 77B(e)(1), 48 Stat. 918 (requiring acceptance of plan by two-thirds in amount of the claims of each class); Chapter X § 179, 11 U.S.C. 579 (1976) (requiring acceptance by two-thirds in amount of the claims of each class); cf. Section 1126(c) (current provision, which requires acceptance by at least two-thirds in amount and more than one-half in number of the claims of each class, but which need not be satisfied if plan is crammed down under Section 1129(b)).

creditors comes within judicial denunciation." *Id.* at 116 (quoting *Louisville Trust Co.* v. *Louisville, N.A. & C. Ry.*, 174 U.S. 674, 684 (1899)).[25] Because the plan before the Court did not satisfy that standard—old equity owners received property under the plan, even though creditors were not repaid in full—the Court rejected the plan. 308 U.S. at 122-132 (analyzing plan).[26]

In the course of elucidating the meaning of the "familiar rule" that the *Case* Court discerned in the "fair and equitable" requirement of Section 77B, Justice Douglas stated in dictum that "there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor," which he described as arising out of "the necessity, at times, of seeking new money essential to the success of the undertaking from the old stockholders." 308 U.S. at 121. Even in those circumstances (which would have included, under the applicable statutory scheme, consent by a requisite majority of the affected classes of claims), the Court explained that the opportunity for participation by the old stockholders should be strictly limited. The Court explained:

> [W]e believe that to accord the creditor his full right of priority against the corporate assets

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[25] As at least one commentator has noted, the accuracy of Justice Douglas's analysis of the prior cases is questionable. See John D. Ayer, *Rethinking Absolute Priority After* Ahlers, 87 Mich. L. Rev. 963, 974-975 (1989).

[26] Three years later, in *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U.S. 78, 85 (1942), the Court applied its analysis of the "fair and equitable" standard in Section 77B to cases arising under Chapter X of the Bankruptcy Act.

> where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder.

Id. at 122 (internal quotation marks omitted).

2. When Congress enacted the Bankruptcy Code in 1978, it dramatically restructured the framework for business reorganizations, in a way that removes any need or basis for the new value rule articulated by Justice Douglas in *Case*. Most importantly, the Code—unlike Chapter X of the Act—includes a detailed definition of the "fair and equitable" standard, which for the most part codifies the absolute priority rule that was the basis for the holding in *Case*. As described above, Section 1129(b)(2)(B) proscribes plans that allow the old equity owners to receive "any property" under the plan "on account of" their ownership interest in the debtor. Nothing in that definition mirrors the new value rule articulated in dictum in *Case*, and thus nothing in the statute specifically authorizes a judge to confirm a plan permitting old equity owners to participate over the objection of a class of unpaid unsecured claims.[27]

[27] Congress's treatment of the subject was not inadvertent. The 1973 Report of the Bankruptcy Commission, on which the Code was based, recommended that Congress include a provision that would have authorized the judge to allow old equity owners to retain an interest under a plan whenever the judge determined that the owners would "make a contribution which is important to the operation of the reorganized debtor." Report of the Commission on the Bankruptcy Laws of the United States, Pt. 2, H.R. Doc. No. 137, 93d Cong., 1st Sess. 242 (1973) (proposed Section 7-303(4)). As the Commission explained in the accompanying note, its intent was that "the absolute priority rule * * * [be] made more flexible." *Id.* at 254. After the Commission's proposal on that point was criticized heavily, Congress abandoned it in favor of the scheme that appears in Section 1129. See *Ayer*, *supra* note 25, at 978-979.

Furthermore, in a significant departure from the Code's predecessors, the Code allows a plan to be confirmed even if it does not meet the fair and equitable standard, if the creditors consent.[28] The Code's reliance on creditor consent limits the scope of concerns courts need to address under the malleable "fair and equitable" requirement. Under Chapter 11 of the Code, creditors are permitted to determine if their best interests will be served by a plan that permits participation by the old equity holders even if the creditors' claims are not repaid in full, and if the creditors—voting in classes—agree to the plan, the bankruptcy judge can confirm it, even if it does not satisfy the "fair and equitable" standard of Section 1129(b)(1).

Creditors might agree to such a plan for any number of reasons. Most obviously, one or more of the old equity owners might have a special expertise

[28] Congress recognized the importance of that change. As Senator DeConcini and Representative Edwards explained in their detailed comments to their respective Chambers regarding the final version of the bill that became the Code:

> It must be emphasized that the fair and equitable requirement applies only with respect to dissenting classes. Therefore, unlike the fair and equitable rule contained in chapter X and section 77 of the Bankruptcy Act under section 1129(b)(2), senior accepting classes are permitted to give up value to junior classes as long as no dissenting intervening class receives less than the amount of its claims in full.

124 Cong. Rec. 32,407 (comments of Representative Edwards), 34,006 (remarks of Senator DeConcini) (1978).

or interest in the business that could not securely be brought to the aid of the continuing business without according an ownership interest to the old equity owner. In cases where the creditors believe that participation in ownership of the reorganized business by the old equity owners would increase the value of the business, they should be able to negotiate an agreement under which a portion of that increase would inure to the benefit of the creditors, and thus increase the amounts they recover on their claims. On the other hand, creditors in many cases might oppose continued participation by the old owners, either because they do not believe that continued management by the old owners would be helpful (perhaps because mismanagement by the old owners was the cause of the business's failure), or because they believe that continued assistance in management by the old owners can be ensured adequately by employment agreements, without also conferring an ownership interest in the reorganized enterprise. As a result, the provisions of Chapter 11 create a mechanism that allows the parties with an economic interest in maximizing the value of the business—the unpaid creditors—the ability to negotiate an agreement with the equity owners allowing continuing ownership participation in those cases where it is in the best interests of the creditors.[29]

[29] See House Report, *supra* note 13, at 224 ("[N]egotiation among the parties after full disclosure will govern how the value of the reorganizing company will be distributed among creditors and stockholders. * * * Only when the parties are unable to agree on a proper distribution of the value of the company does the [Bankruptcy Code] establish a financial standard."); Walter J. Blum and Stanley A. Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U. Chi. L. Rev. 651, 653 (1974) ("The absolute priority doctrine can be characterized as a way of structuring negotiations so that they are sufficiently disciplined to be held within permissible areas and to permit judicial review.").

3. The provisions of the Code permitting a court to confirm a plan that does not meet the "fair and equitable" standard if the plan secures the requisite votes of the creditors remove any need for a court to recognize a rule that would permit prior equity owners to participate in a reorganization upon the contribution of new value. The *Case* Court discerned such an exception in the general language of the Act to deal with cases where "the necessity * * * of seeking new money [was] essential to the success of the undertaking," 308 U.S. at 121. As the *Case* opinion makes clear, that exception was designed to increase the economic prosperity of the reorganized business—and thus the recovery of the unsecured creditors—not to further some more generalized policy favoring continued participation by the old owners for its own sake.[30]

Because the new Code includes a separate mechanism that allows creditors to decide for themselves when continued participation will increase their recovery, there is no need for courts to interpret the

[30] The "necessity" to which the Court refers in *Case* is for money "essential to the success of the undertaking." Given the *Case* Court's clear premise that "creditors are entitled to priority over stockholders against all the property of an insolvent corporation," 308 U.S. at 120, and its admonition that the interest given old owners for any contributions of new value must be "reasonably equivalent to their contribution," *id.* at 121—lest "the creditor's rights * * * be easily diluted by inadequate contributions by stockholders," *id.* at 122—the *Case* Court plainly understood that any net increase in value would be applied to defray the claims of the creditors.

"fair and equitable" standard to permit participation in other circumstances. When the creditors have not consented, the parties with money at stake[31] have expressed their view that continued participation by old equity owners on the terms proposed by the debtor would not be in the best interests of the enterprise as a whole. If the purpose of allowing the old owners to participate is to increase the recovery of the creditors—and we do not discern any other basis in the Court's opinion in *Case* or the language of the Code—courts should not second-guess the view of the creditors themselves that continued participation would not be beneficial.[32]

[31] The old owners would be entitled to a recovery from the business (and thus would have money at stake) only if their participation would be so productive that the business (under their direction) would produce sufficient funds not only to pay off the unsecured creditors, but also to produce a return for their residual interests. If the old owners believed that to be the case, they could protect their interest by causing the debtor to propose a plan that would pay off the unsecured creditors entirely, thus satisfying Section 1129(b)(2)(B)(i), and obviating the need for application of the absolute priority rule set forth in Section 1129(b)(2)(B)(ii). Of course, the judge could confirm such a plan only if it found that the plan was "not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor." Section 1129(a)(11).

[32] The court of appeals in this case did not suggest that the new value rule should be used to further some general interest in continued ownership of the business by the prior owners. Rather, the court concluded (Pet. App. A50) that the absolute priority rule does not bar a plan that allows the owners of a debtor to participate in ownership of the reorganized business upon the contribution of new value because that "participation is necessary for a successful reorganization and in the best interests of all concerned." In our view, the best yardstick for measuring a "successful" reorganization under the Code is

A rule permitting judges to force creditors to accept plans that allow continuing ownership on terms that the creditors believe would not further the profitability of the business also would tend to have adverse consequences for the reorganization process as a whole. As numerous commentators have recognized, the delay and expense involved in Chapter 11 proceedings has undermined the effectiveness of that statute considerably.[33] Many commentators believe that the problems with Chapter 11 are closely related to a debtor's incentive and ability to delay those proceedings and bargain for results to which it is not entitled under the Code.[34] The rule adopted by the

whether it increases the value of the estate over the other available alternatives. To put it another way, a reorganization is not "successful" solely because it allows the owners of the failed business to remain in control if it at the same time decreases the recovery of the parties who have money at stake in the proceeding. For the reasons explained in the text, we believe that the court of appeals went astray in assuming that a judge is in a better position than the creditors themselves to determine what plan best increases the recovery of the creditors.

[33] See, *e.g.*, Barry E. Adler, *Bankruptcy and Risk Allocation*, 77 Cornell L. Rev. 439, 489 (1992); Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. Legal Stud. 127 (1986); Lucian A. Bebchuk, *A New Approach to Corporate Reorganizations*, 101 Harv. L. Rev. 775, 777-781 (1988); Michael Bradley and Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 Yale L.J. 1043 (1992); Thomas H. Jackson and Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155, 190 (1989); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 Texas L. Rev. 51, 78-84 (1992).

[34] See, *e.g.*, Bebchuk, *supra* note 33, at 780 & n.19 ("When the value of the reorganized company is lower than the total

court of appeals in this case would give debtors an additional incentive to delay and oppose prompt resolution of the proceedings, in the hope that they might be able to convince a judge to confirm a plan that would allow their owners to retain an interest in the business even if the owners are not able to repay all of the unsecured creditors or convince them that continued ownership would further the creditors' interests. In light of the problems arising under the current process, the Court should not adopt a rule that increases the bargaining power of a debtor beyond what it currently has.[35]

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value of creditors' claims, the equityholders might have nothing to lose and something to gain from a delay."); Bradley & Rosenzweig, *supra* note 33, at 1076-1077 ("Filing a Chapter 11 petition, in effect, is a way to keep control of the firm free from the intrusive monitoring of creditors, thereby permitting management to extract wealth from the firm's various security holders."); Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 Wis. L. Rev. 729, 731-737; Robert K. Rasmussen, *supra* note 33, at 76 ("It is clear * * * that equity holders often participate in a reorganization even where there is little probability that they are contributing firm-specific skills to the reorganized enterprise."); David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 Wis. L. Rev. 465, 515 (referring to "the hold up power currently wielded * * * by the shareholders of a Chapter 11 debtor [in a nonclosely held corporation case]").

[35] Empirical studies suggest that debtors under the current process generally receive significantly more in Chapter 11 plans than the absolute priority rule would permit. Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?* (Pt. 2), 57 Am. Bankr. L.J. 247, 263-266 (1983) [hereinafter Lopucki, *Full Control?*] (empirical study of one year's cases from the Western District of Missouri suggests that small debtors almost uniformly retain ownership of the company if it successfully reorganizes,

In sum, the differences between the confirmation provisions of the Code and those of the Act undercut the concerns that led the Court to suggest in *Case* that a contribution of new value by old equity owners might suffice to permit continued participation under a plan of reorganization. Under the framework established by the Code, any plan that permits such participation over the objection of a class of unpaid unsecured claims is—even aside from the specific requirements of Section 1129(b)(2)—not "fair and equitable" within the meaning of Section 1129(b)(1). Accordingly, Section 1129(b) does not authorize confirmation of such a plan.

B. At a minimum, the absolute priority rule does not permit confirmation of a plan that grants equity owners an exclusive right to acquire an ownership interest in the reorganized enterprise over the objection of a class of unpaid unsecured claims

As in *Ahlers*, the Court could dispose of this case without reaching the broad question discussed in

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without regard to whether creditors are fully paid); Jerome R. Kerkman, *The Debtor in Full Control: A Case for Adoption of the Trustee System*, 70 Marq. L. Rev. 159, 165-183 (1987) (similar conclusion based on study of cases from the Eastern District of Wisconsin). That conclusion holds true even in the reorganizations of large, publicly traded companies, where it is highly unlikely that the shareholders possess any particular skill necessary to the reorganization of the company. See Lynn M. LoPucki and William C. Whitford, *Bargaining over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. Pa. L. Rev. 125, 141-143 (1990) (empirical study of the bankruptcy reorganizations of large, publicly held companies shows that equity received distributions in 70% (21 out of 30) of the cases in which the creditors were not fully repaid).

Point II.A above, because the plan proposed by the debtor in this case cannot be reconciled with the language of the absolute priority rule set forth in Section 1129(b)(2)(B)(ii).

The plan in this case grants the equity owners of the debtor the right to purchase a substantial (indeed, controlling) ownership interest in the reorganized business in return for a contribution of $200,000 and the obligation to fund any working capital shortfalls that the enterprise experiences during the first few years of operations.[36] The plan does not allow any other person—whether a creditor or an independent financier—an opportunity to bid for that ownership interest or to purchase a portion of it together with respondent's owners. To put it another way, the right of respondent's owners to acquire that ownership interest—which includes the entirety of the common stock to be issued at the inception of the plan—is exclusive of the rights of all third parties to bid on or otherwise acquire that interest.[37]

[36] We mention the obligation to fund working-capital shortfalls for completeness, although the plan does not specify that compliance with that obligation is a condition of respondent's owners continuing to control the reorganized business. See J.A. 19 (describing obligation to fund future shortfalls but not describing any remedy for a default). Compare J.A. 20 (collateral trust mortgage to be contributed by H.F. Magnuson would be collateral only for "indebtedness assumed by the Reorganized Debtor in conjunction with this Plan").

[37] For an example of a court that allowed prior owners to purchase ownership interests in a reorganized business only if they were willing to pay more than other parties in a competitive auction, see *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1008-1011 (Bankr. D. Mass. 1991) (Queenan, J.). For a discussion of the practical advantages a debtor would retain even if other parties have an opportunity to compete with the debtor's owners for the purchase, see Lopucki, *Strategies*, *supra* note 4, § 11.11.2.

We submit that the exclusive right granted respondent's owners is a species of "property"; it closely resembles a stock warrant.[38] The most plausible justification for the grant is the status of those individuals and entities as owners of the debtor. That justification, however, violates the absolute priority rule set forth in Section 1129(b)(2)(B)(ii), because it results in a grant of "property" "on account of" the "junior claim or interest" held by respondent's owners.

Nor can the interest granted to the old owners be justified by stating that it is granted "on account of" their contribution of new value. To be sure, it has been argued that an ownership interest in a reorganized business that is granted to old equity owners who contribute new value is not barred directly by Section 1129(b)(2)(B)(ii), because the interest in the business is granted "on account of" the contribution of new value, rather than the status of the purchasers as prior owners.[39] But that argument can justify permitting prior owners to participate in ownership of a reorganized debtor only

[38] See *Black's Law Dictionary* 1422 (5th ed. 1979) (defining stock warrant as "[a] certificate entitling the owner to buy a specified amount of stock at a specified time(s) for a specified price"). When a warrant is issued by a company whose articles of incorporation authorize the issuance of only a limited number of shares (as is customary, and as is the case here), the warrant effectively grants an exclusive right to acquire the shares in question.

[39] A lucid explication of that view appears in Elizabeth Warren, *A Theory of Absolute Priority*, 1991 Ann. Survey Amer. Law 9, 39.

if they participate on the same terms as other parties. When a plan allows the old owners to participate on terms not available to others, it has given the old owners something—"property" for purposes of Section 1129(b)(2)(B)(ii)—that cannot be justified solely by reference to the contribution of value.[40] If the rights were granted solely "on account of" the value contributed, then they would be accorded to any party that is willing to make a similar contribution.[41]

[40] As Professor Warren explains:

> The Code leaves old equity in the position of any other potential investor: it may offer to buy any of the assets of the estate on the same terms as any other buyer.
>
> Some commentators argue that the estate is not buying on the same terms as any other buyer because it enjoys a better position than all other buyers in chapter 11. Nothing in the Code gives equity such a beneficial position. If courts are in fact giving them enhanced status, they should not do so.

Warren, *supra* note 39, at 39.

[41] Nor is there merit in the suggestion of the court of appeals (Pet. App. A50) that the interest is permitted because it is granted in furtherance of "a successful reorganization and in the best interests of all concerned." The fundamental flaw in that suggestion is that it authorizes confirmation of a plan that grants an interest to a party with no claim against the debtor. Section 1129 provides that a plan of reorganization will distribute the assets and income of the estate of an insolvent business to repay the claims against the estate. Except where parties consent to different treatment, the distribution must be made in accordance with the priority of the claims (except where parties purchase assets of the estate, or an interest in the estate, a justification abjured by the court of appeals). The reasoning of the court of appeals is inconsistent with that framework, because it authorizes judges to give an interest in the reorganized business to a party on a basis other than the party's holding a claim against the debtor. Just as the Code expressly provides that it is not fair and equitable to grant an interest to a junior claimant while an objecting class of senior claimants is unpaid, courts should apply the general "fair and equitable" language in Section 1129(b)(1) to bar plans that vest in an interest in a party based on a claim junior to the claim held by the most junior claimant—*i.e.*, a party that has no claim whatsoever.

Finally, the fact that the plan (typically proposed by the debtor, as in this case[42]) makes the right to acquire the ownership interests exclusive strongly suggests that—at least in the debtor's view—the right has value, in the sense that the debtor believes that the ownership interests are worth more than the price set by the plan. If the debtor did not believe that the ownership interests were worth more than the price set by the plan, it presumably would be willing to compete for the purchase with other parties. When the parties with money at stake object to that plan, the ground for that inference is particularly strong. Hence, cramdowns in exclusive-purchase cases present especially strong concerns that the debtor's owners are securing value under the plan that

[42] Section 1121(b) generally grants the debtor the exclusive right to file a plan for the first 120 days of the proceeding. As a practical matter, it appears that it is quite unusual for a judge to reject a debtor's request to extend that period. As a result, it is unusual for a party other than the debtor to propose a plan of reorganization. See Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 Wis. L. Rev. 11, 31 n.67 (empirical study of large bankruptcies indicating that debtor retained the right of exclusivity throughout the entire proceeding in 79% [34 of 43] of the cases); LoPucki, *Full Control?*, *supra* note 35, at 253-257 (rarity of creditor-proposed plans in small cases).

properly should belong to the unpaid unsecured creditors.

* * * * *

The plan proposed by respondent grants respondent's owners a right—not available to any other party—to acquire an overwhelming share of the ownership interests in the reorganized debtor. Petitioner, however—who controls an impaired class of unsecured claims—would not consent, and the plan does not provide for payment in full of the claims of that class. As a result, Section 1129 bars confirmation of the plan.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable;[1]

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

[1] So in original. The semicolon probably should be a period.

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5) or 507(a)(6) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(7) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor

to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930,[2] as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to

[2] So in original. Probably should be section 1930 of title 28.

the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.